United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 22,143

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

569

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
TELEPROMPTER CORPORATION,
TELEPROMPTER MANHATTAN CATV CORPORATION,
STERLING INFORMATION SERVICES, LTD.,
STORER BROADCASTING COMPANY,
Intervenors.

**Petition To Review an Order of the
Federal Communications Commission**

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PAUL RODGERS *as*
General Counsel for the
National Association of
Regulatory Utility Commissioners

3327 ICC Building
Post Office Box 684
Washington, D.C. 20044

October 16, 1968

THE CASILLAS PRESS, INC. — 1717 K Street N. W. — Washington, D. C. — 223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Administrative Decisions:

Statutes:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,143

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
TELEPROMPTER CORPORATION,
TELEPROMPTER MANHATTAN CATV CORPORATION,
STERLING INFORMATION SERVICES, LTD.,
STORER BROADCASTING COMPANY,
Intervenors.

**Petition To Review an Order of the
Federal Communications Commission**

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

STATEMENT OF THE ISSUES

The following issues are presented for review in this case:

1. Whether the Federal Communications Commission erred in holding that it is authorized to enter cease and desist orders under Section 312 of the Communications Act to enforce Section 214 of the Act?

2. If cease and desist orders can be used to enforce Section 214 of the Communications Act, whether the Commission, in entering cease and desist orders below, erred by

failing to comply with the requirements of Section 312 of the Act, relevant provisions of the Administrative Procedure Act and the Due Process Clause of the United States Constitution?

3. Whether the Commission erred in deciding that communications service through cable facilities used by a common carrier to carry signals from the tower or headend of a CATV system to the premises of CATV subscribers is an interstate, rather than an intrastate, communications service, where the said facilities are located wholly within a single State and, if so, whether the Commission erred in concluding that such service and the facilities used to provide it are not exempted from its jurisdiction?

4. Whether the Commission erred in deciding that common carriers must apply for certification, pursuant to Section 214 of the Communications Act before acquiring, operating or undertaking the construction of distribution facilities to provide channel service to CATV systems where the said facilities are located wholly within single States and are not connected with other common carrier facilities and irrespective of whether the distance between the end points of such facilities is less than ten miles?

5. Whether the Commission's decision is supported by adequate findings based upon substantial evidence, has a rational basis in the record, or is in compliance with Section 8(b) of the Administrative Procedure Act?

6. Whether the Commission erred in failing to conclude that certain of the carriers in these proceedings which heretofore have been classified as "connecting carriers" within the meaning of Section 2(b)(2) of the Communications Act continue to be "connecting carriers" and are not subject to Section 214 of the Act?

7. Whether the Commission erred by failing to conclude that furnishing cable distribution services to CATV operators by the carriers in this case is the furnishing of "telephone exchange services" within the meaning of Section 221(b) of the Communications Act?

This case has not been before the Court previously under the same or a similar title.

STATEMENT OF THE CASE

In this case, the National Association of Regulatory Utility Commissioners, hereinafter referred to as the "NARUC", seeks to enjoin, set aside, annul, suspend, and determine the invalidity of a final Order adopted by the Federal Communications Commission on June 25, 1968, and released to the public on June 26, 1968, *In the Matter of General Telephone Company of California (formerly California Water and Telephone Company), The Associated Bell System Companies, The General Telephone System and United Utilities, Inc., Companies, Applicability of Section 214 of the Communications Act with regard to Tariffs for Channel Service for Use by Community Antenna Television Systems, Docket No. 17333.*

The NARUC, which represents the interests of the State regulatory agencies, contends that such Order is invalid because it seeks, in contravention of the Communications Act of 1934, as amended, to expand the Commission's regulatory jurisdiction over activities of telephone companies which are primarily of local concern and which are subject to adequate State and local regulation.

This case arises out of the proceeding in the said Docket No. 17333 which was conducted by the Commission to determine whether telephone company appellants, the respondents below, are subject to the certification requirements of Section 214 of the Communications Act of 1934 (48 Stat. 1075, 47 U.S.C., Sec. 214), as amended, with regard to the construction of channel service facilities for use by community antenna television (CATV) systems.

A CATV system is a facility which receives television signals and FM radio signals off the air by means of high antennas or by microwave transmission, amplifies the signals and distributes such signals by coaxial cable to the premises of its subscribers who pay a fee for the service. The system

consists of a number of connecting sections which may be characterized as the reception, headend, and distributions systems.

At the beginning of the system are located the towers, antennas, microwave receivers, and other equipment necessary to receive the program material. The headend section consists of the electronic equipment used to convert, modify and modulate the signals bearing the intelligence received at the antenna before traveling into the wire distribution system. Generally, the headend equipment is located in a building adjacent to the tower, although this is not essential.

The distribution system consists of feeder or trunk lines which originate at the headend and may be branched repeatedly to reach different sections of the system; the smaller distribution cables which carry the signal to the immediate vicinity of the subscriber; and the "drop" wires which carry the signal from the distribution cable to a terminal block on the premises of the individual subscriber. The final link in the system is the cable extending from the terminal block to the television set of the subscriber.

In some instances the distribution system is provided by the CATV owner who either constructs all of the necessary facilities or strings his cable on the poles of a utility company for which a rental fee is paid pursuant to a pole line attachment arrangement. In other cases, the telephone company serving the CATV community provides the channel service transmission system. While in some instances the telephone company provides the headend equipment, it generally provides service only from the headend to the premises of the subscriber.

This proceeding is concerned only with channel service offerings by telephone companies to CATV systems, not with the distribution system constructed by the CATV owner or provided pursuant to pole line attachment arrangements.

On April 6, 1966, the Federal Communications Commission sent letters to the American Telephone and Telegraph

Company (AT&T) and General Telephone and Electronics Service Corporation (General) directing the operating telephone companies of the Bell and General Systems to file tariffs for local distribution facilities furnished for the use of CATV systems. Upon petition of the carriers and after protest by the NARUC, reconsideration was denied. *Common Carrier Tariffs for CATV Systems,* 4 FCC 2d, 257, adopted June 22, 1966, and released June 29, 1966. Therein the Commission held that such local distribution facilities provide services that are "incidental to radio communication" within the meaning of Section 202(b) of the Communications Act of 1934, as amended, and that tariffs for such services are required to be filed with the Commission pursuant to Section 203(a) of the Act.

On October 12, 1966, the Federal Communications Commission instituted an investigation in Docket No. 16928 into the lawfulness of the tariffs filed by the General Telephone Company of California. 5 FCC 2d 229. Like action was taken with respect to tariffs filed by operating subsidiaries of Bell in Docket No. 16942 on October 20, 1966, 5 FCC 2d 357; and the operating subsidiaries of General and United in Docket No. 17098 on January 11, 1967. 6 FCC 2d 434. In the latter two proceedings the Commission found that, in addition to the questions of lawfulness raised in Docket No. 16928, the tariffs raised questions as to the applicability of Section 214 of the Communications Act, and Part 63 of the Rules. In the Docket No. 17098 proceeding, inquiry was also directed into the extent of the Commission's jurisdiction over pole line attachment arrangements with CATV operators and, if it exists, how it should be exercised. The issues in Docket No. 16928 were broadened accordingly, and the three proceedings were consolidated for hearing. 6 FCC 2d 440, 441.

After review of the status of such consolidated proceedings, the Federal Communications Commission concluded that the proceedings involved adjudication within the meaning of Section 2(d) of the Administrative Procedure Act (5 U.S.C., Sec. 551) insofar as the issues concerning the

applicability of Section 214 are concerned since, if applicable, the Commission proposed to take remedial action, including the issuance of cease and desist orders, against individual carriers on the basis of the evidence adduced. For this reason the Section 214 issues were deleted from the consolidated proceedings in Docket Nos. 16928, 16943, and 17098; and a separate adjudicatory proceeding in Docket No. 17333 was initiated for the purpose of hearing and determining the Section 214 issues. 7 FCC 2d 571. 575.

In Docket No. 17333, the Commission designated issues for hearing as follows:

(a) Whether (with respect to the Bell System Companies) the requirements of Section 214 of the Act and Part 63 of our Rules implementing that Section have been met as to the facilities used to offer channel service under the aforesaid tariffs and, if not, what action, if any, the Commission should take with respect thereto; and

(b) Whether (with respect to the non-Bell System Companies) any of the respondents are subject to the requirements of Section 214 of the Act and Part 63 of our Rules implementing that Section and, if so, whether these requirements have been met as to the facilities used to offer CATV channel service under the aforesaid tariffs and what action, if any, the Commission should take with respect thereto.

The Federal Communications Commission also called attention to the fact that the legal issues which had been designated included questions concerning the applicability of the exception in Section 214(a) for "local, branch, or terminal lines not exceeding 10 miles in length" and whether carriers claiming to be "connecting carriers" under Section 2(b)(2) of the Act are subject to the certificate requirements of Section 214 by virtue of furnishing channels of

communication to CATV systems. The Commission required that upon completion of the evidence, the Hearing Examiner not prepare a recommended decision but that he certify the record to the Commission for decision.

During the hearings below, it was determined that in no case where channel service is furnished by a Bell on General System company do the facilities cross State lines; nor in any case is a subscriber located as much as ten airline miles from the headend of the CATV system serving him. Only one "connecting carrier" in the United System provides channel service to a CATV system having a subscriber living more than ten airline miles from the headend, but such service is provided solely within a single State. Only one "fully subject" carrier in the United System provides channel service across a State boundary, but each subscriber to such service resides within ten airline miles of the headend system.

Thus, the services in question are either provided solely within a single State, provided by a "connecting carrier", provided to subscribers all of whom are located within ten air miles of the headend, or are subject to all three of these characterizations.

Following the conclusion of the hearings, the Hearing Examiner closed the record by order released August 1, 1967, and certified the record to the Commission by order released August 24, 1967. Oral argument was heard by the Commission *en banc* on February 26, 1968, and the said Order was adopted June 25, 1968.

In such Order, the Federal Communications Commission rejected the contentions of the NARUC and held, *inter alia*:

(a) That the telephone company respondents' offerings of channel distribution services to CATV operators are subject to the Commission's jurisdiction;

(b) That the telephone company respondents, "fully subject" to the Communications Act of 1934, are required to obtain certificates of public convenience and necessity pursuant to Section 214 of the Act prior to constructing facilities to provide channel service to CATV operators; and

(c) That the telephone company respondents, previously classified as "connecting carriers" under Section 2(b)(2) of the Communications Act (48 Stat. 1064, 47 U.S.C., Sec. 152 (b)(2)), are also required to obtain such certificates pursuant to Section 214 of the Act prior to constructing such facilities, and that the Commission's earlier decision in *In re Capital City Telephone Company*, 3 FCC 189 (1936), was overruled to the extent of its inconsistency with the Order.

The Commission issued cease and desist orders against the telephone company respondents prohibiting the further construction or operation of CATV channel service facilities pending compliance with the certification procedures of Section 214.

On July 15, 1968, Bell, General, and United each filed a notice of appeal from the Commission's Order with this Court, and on July 18, 1968, the NARUC filed its petition to review said Order with the Court.

The Commission, on July 26, 1968, in response to petitions by Bell, General and United, stayed, pending review by this Court, the effectiveness of certain provisions of the Order released on June 26, 1968, so as to permit the continued operation of those CATV channel distribution facilities which were constructed and in operation on or before June 26th. FCC 68-775.

Upon motion by the Commission, the Court by *per curiam* order filed August 21, 1968, consolidated the four appeals of the telephone company respondents (Case Nos. 22,106, 22,112, 22,113, and 22,116) and the NARUC's petition for review (Case No. 22,143). On the same date, the Court also granted the motions to intervene which had been filed by the National Cable Television Association, Inc., TelePrompTer Corporation, TelePrompTer Manhattan CATV Corporation, Sterling Information Services, Ltd., and Storer Broadcasting Company.

ARGUMENT

I

CONGRESSIONAL POLICY, AS REFLECTED BY THE COMMUNICATIONS ACT, REQUIRES THE PRESERVATION OF STATE JURISDICTION OVER INTRASTATE COMMUNICATIONS AND OVER INTERSTATE AND FOREIGN COMMUNICATIONS PRIMARILY OF LOCAL CONCERN

When Congress enacted the Communications Act in 1934 the telephone industry, as it is today, was deeply involved in interstate commerce. AT&T President Gifford, in testifying on March 13, 1934, before the Senate Committee on Interstate Commerce on S. 2910, a bill proposing the Act, stated that:

> There are interconnected in the United States approximately 16,600,000 telephones, of which 13,163,000 are Bell telephones, the balance being owned by over 6,000 connecting telephone companies and 25,000 connecting rural telephone lines. Telephone service is available to subscribers and nonsubscribers through public telephones, so that today practically anyone anywhere can speak with anyone else anywhere else any time of the day or night.[1]

Later on in his testimony, President Gifford stated that "every telephone, and hence every telephone circuit, is an interstate telephone and circuit, to which the Federal power reaches because they are instrumentalities of interstate commerce."[2]

Undoubtedly, Congress in 1934, through the exercise of its broad powers under the Commerce Clause,[3] could have

---

[1] Hearing record, p. 75, 4th par.

[2] *Id.*, p. 89, 2d par.

[3] Constitution, Art. I, Sec. 8, Cl. 3.

totally preempted the regulation of the telephone industry because generally the same facilities were used, as they are today, for both interstate and intrastate communication.

However, Congress chose to preserve state regulation over intrastate communications and over interstate and foreign communications primarily of local concern. Congressional deference for state and local regulation is clearly evidenced by several provisions of the Act, some of which will be considered in greater detail later.

Section 2(b)(1) of the Act, subject to the radio licensing provisions of Section 301, prohibits Commission jurisdiction over intrastate communications,[4] thereby precluding application of the *Shreveport Doctrine. Houston, E. & W. T. Ry. Co. v. United States* (1914), 234 U.S. 342, 58 L.ed. 1341, 34 S.Ct. 833.

Section 2(b)(2)(3)(4), largely preserves state jurisdiction over "connecting carriers"[5] irrespective of their engagement in interstate or foreign communication through interconnection with nonaffiliated carriers.[6]

Section 3(e), in defining the terms "interstate communication" and "interstate transmission" as they relate to Title II, excludes therefrom "wire on radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.".

Paragraph (h) of Section 213 provides that nothing in that Section, relative to Commission valuation of carrier property,

---

[4] Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong. 2d Sess., p. 3.

[5] Defined in Section 3(u) of Act.

[6] Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., pp. 2 and 4.

"shall impair or diminish the powers of any State Commission.".

Section 214, requiring certificates of public convenience and necessity for construction, acquisition or operation of lines, exempts from certification (1) lines within a single state which are not part of interstate lines, (2) local, branch or terminal lines not exceeding ten miles in length, and (3) lines acquired through consolidation of common carriers. Consequently, these exempted facilities are reserved for state regulation.

Section 220, relating to accounting and depreciation matters, authorizes the Commission to exempt various classes of carriers from the requirements of the Section in cases where the carriers would be subject to state commission regulation (Par. (h)), and requires the Commission to consult with state commissions in administering the Section (Par. (i)), and further requires the Commission to report to Congress any need for legislation to harmonize federal-state regulatory efforts involving the subject matter of the Section (Par. (j)).

Section 221(a), relating to consolidation of telephone companies, requires that state commissions be notified of proposed consolidations and that they be given an opportunity to be heard. The Section states that nothing therein "shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies."

Section 221(b) provides that the Commission shall not have jurisdiction with respect to charges or facilities in connection with wire, mobile, or point-to-point radio telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign communication" in any case where such matters are subject to state or local regulation.

Section 410 provides for Commission use of state joint boards and federal-state joint hearings in administering the

Act, and for consultation between the Commission and the state commissions, and for other cooperative endeavors.

These provisions of the Act clearly demonstrate that Congress intended to commit to the Commission the regulation of matters beyond the ability of the States to individually regulate, and to preserve state regulation in matters primarily of local concern irrespective of their involvement in interstate or foreign communication. Furthermore, it is equally clear that Congress intended for the Commission and the state commissions to work cooperatively to advance the public interest.

In ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests in the federal scheme must always be in the background.

The Commission, in its regulatory efforts affecting the CATV industry, has selected two distinct and separable jurisdictional bases in the Communications Act to accomplish two distinct and separable objectives.

The First Objective

The *first* objective of the Commission is to regulate the television program market in such a manner as to prevent CATV systems from disrupting the television broadcasting industry. The Commission, relying on Sections 1, 4(i), 303(f)(h)(r), 307(b) and 403 of the Act, has adopted regulations governing the carriage and nonduplication of television programs by CATV systems in an effort to achieve a proper relationship between basic broadcast service and CATV service.[7]

The FCC, as to the first objective, is primarily concerned with the serious competitive impact of CATV services upon local broadcasting stations and the threatened

---

[7] *Second CATV Report and Order* (1966) 2 FCC 2d 725, at pp. 728, 793. See also *Buckeye Cablevision, Inc. v. FCC*, (CA-DC-June 30, 1967), No. 20274.

economic elimination of the latter as a result of CATV duplication of the very programs upon which the local station relies for its sponsor-advertising revenues. The FCC believes such a result would completely deprive surrounding rural populations which are not served by CATV, and such portion of the urban community population as could not afford the CATV's monthly service charges, of all television reception and, further, would deprive the whole community of important local interest programs, local projects, news, weather, etc., which are generally provided by a local broadcasting station. Compare: *Cable Vision, Inc. v. KUTV, Inc.*, (DC-Idaho-1962) 211 F. Supp. 47, at p. 55, r col., 1st par., vac and remd on oth grds (CA-9th-1964), 335 F.2d 348, cert. den., 379 U.S. 989, 13 L.ed.2d 609, 85 S. Ct. 700.

With this problem in mind, the FCC has evolved a regulatory scheme employing carriage and non-duplication provisions which is designed to foster a public interest-oriented relationship between CATV companies and local broadcasting stations. The official documents reflecting this scheme are reported in: the Notice of Inquiry and Notice of Proposed Rulemaking adopted on April 22, 1965, in Docket No. 15971, 1 FCC 2d 453-495, 30 FR 6078; First Report and Order adopted on April 22, 1965, in the Docket Nos. 14895 and 15233, 30 FCC 683; Memorandum Opinion and Order adopted on July 7, 1965, in Docket Nos. 14895 and 15233, 1 FCC 2d 524-530; and the Second Report and Order adopted on March 4, 1966, in Docket Nos. 14895, 15233, and 15971, 2 FCC 2d 725-820.

In short, these notices and orders clearly reflect that the FCC is primarily concerned with regulating the carriage of television programs in such a fashion as to protect the local broadcasting stations from ruinous competition from CATV systems. Such a regulatory undertaking can be best handled by the FCC. The States have no desire to enter this area.

This assertion of FCC jurisdiction was affirmed by the Supreme Court on June 10, 1968, in *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L.ed.2d 1001.

Specifically, the Supreme Court upheld the authority of the FCC to regulate the extension of certain television signals by a CATV system.

Following a complaint, the FCC initiated proceedings pursuant to its Rule, 47 CFR, Sec. 74.1107(a), which provides:

> No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

It was alleged that the respondent transmitted the signals of a Los Angeles television station into the San Diego area, the 54th largest television market. The FCC restricted the expansion of respondent's system pending full review of complaints received, 4 FCC 2d 612, but the Ninth Circuit Court of Appeals held that the Commission lacked such authority under the Communications Act of 1934, 47 U.S.C., Sec. 151 *et seq.* The Supreme Court reversed.

After initial determinations that it had no regulatory authority over CATV systems, 26 FCC 403, the Commission has ultimately held that it has authority under the Communications Act (1) to require CATV systems to transmit to their subscribers the signals of any station into whose

service area they have brought competing signals, First Report and Order, 38 FCC 683, 716-19, and (2) to forbid the duplication of the programming of such local stations for certain periods before and after a local broadcast, *Id.* at 719-30. Finally, the Commission made the above two requirements applicable to both microwave and cable CATV systems in addition to the importation limitation set forth in the Second Report and Order, 2 FCC 2d 725.

In considering the scope of the Commission's regulatory authority under the Communications Act, the Court specifically held that "CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates . . . . television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible." 392 U.S. 168, last par, 20 L. Ed.2d 1011(2).

After noting that "CATV systems are not common carriers within the meaning of the Act", 392 U.S. 169, 20 L. Ed.2d 1011, ftn. 29, the Court held that "the Commission's authority over 'all interstate . . . communication by wire or radio' permits the regulation of CATV systems." 392 U.S. 178, 1st par., 20 L.Ed.2d 1016(14).

The Court's holding was specifically limited, however, to an approval of Commission jurisdiction "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The Court expressed "no views as to the commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 178, 2d par., 20 L.Ed.2d 1016(15).

This decision by the Supreme Court is entirely consistent with the position of the NARUC in this case. In *Southwestern Cable*, the Court simply upheld, in the absence of a contrary statutory prescription, the Commission's exercise of jurisdiction "reasonably ancillary" to the effective performance of its responsibilities under Title III of the Act. In no way may the case be interpreted to permit the Commission to sweep away the provisions of Title II of the Act which reserve to the States regulatory jurisdiction over the facilities in issue here.

The Second Objective

The second objective of the Commission, which is now in issue before this Court, is to enlarge its jurisdiction over telephone common carriers by requiring them: (1) to file their tariffs for furnishing CATV channel service to CATV systems, on the ground that such services are "incidental to radio communication" within the meaning of Section 202(b) of the Act (4 FCC 2d 257); and (2) to obtain certificates pursuant to Section 214 of the Act with regard to the construction of channel service facilities for use by CATV systems.

The Commission's decision to regulate the *charges* and *services* involved in common carrier provided CATV channel service facilities, as being "incidental to radio communication" under Section 202(b), does not control, and is separable from, the aspects of this proceeding which concerns the certification of *facilities* under Section 214.

The failure of the Commission to accomplish its second objective would not impair, or be inconsistent with, its regulatory accomplishment of the first objective.

II

THE CERTIFICATION REQUIREMENTS OF SECTION 214 OF THE COMMUNICATIONS ACT ARE NOT APPLICABLE TO COMMON CARRIER CATV CHANNEL SERVICE FACILITIES WHEN LOCATED ENTIRELY WITHIN A SINGLE STATE OR WHEN NOT EXCEEDING TEN MILES IN LENGTH.

A. Single State CATV Channel Service Facilities

Section 214 of the Communications Act of 1934 was derived from, and is similar to, Section 1 (18-22) of the Interstate Commerce Act relating to ICC certification of the construction or extension of a "line of railroad."[8]

The relevant portion of Section 214, as amended,[9] reads as follows:

> (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line

[8]Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Congress, 2d Session, page 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, 73d Congress, 2d Session, page 6. See also *Mackay Radio and Telegraph Company* (1938), 6 FCC 562, at p. 569, last par.

[9]Section 214 was amended by Public Law 4, 205, 78th Congress, 1st Session, approved March 6, 1943, 57 Stat. 11, 12.

> within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Clause (1) of the first provision of Section 214(a) provides in effect that no certificate shall be required for the construction, acquisition, or operation of "a line within a single state unless such line constitutes part of an interstate line".

Since the "lines" at issue herein are located entirely within a single state and are not connected to the line of another carrier, the NARUC submits that they are exempted by clause (1).

The Commission held, however, that the carriers' lines are but "links" in the interstate transmission of television signals and are therefore non-exempt "interstate lines" within the meaning of clause (1). Commission's Order, pars. 17-20, pp. 12-14.

Specifically, the Commission's argument begins with the definition of "line" found in Section 214 (a): "any channel of communication . . . other than a channel of communication established by the interconnection of two or more existing channels." The Commission then concludes that since CATV operators are engaged in communication that crosses a state line, those who provide services or facilities to CATV operators are "links" in the interstate television signal transmission process and are therefore providing "interstate lines" irrespective of the character, location or function of those lines.

Although such CATV operators may distribute interstate signals to their customers, their common carrier provided facilities are not "interstate lines" within the meaning of Section 214.

In ascertaining the congressional intent regarding Section 214, we should first note that the Section must be read in conjunction with Section 2 (a) which provides that the Act shall "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio . . . ". Consequently, if Section 214(a) had been enacted *without* the provisos, Congress would have intended for the Commission to certificate all subject common carrier lines engaged in "interstate or foreign communication."

However, Congress did not see fit to grant such ubiquitous authority to the Commission. For this reason, it

inserted the provisos in Section 214 (a) to limit the sweep of its opening clause. It is *very important* to keep in mind that the lines referred to in clauses (1) and (2) of the first proviso are lines involved in "interstate or foreign communication" and that they are not lines involved in intrastate communication. If clauses (1) and (2) referred to lines involved in intrastate communication then the clauses would be completely useless because the Communications Act specifically states that it shall not apply to intrastate communication. See Sec. 2(b)(1).

The purpose of a proviso is to take a special case, or a class of cases, out of the operation of the body of the section of the statute in which it is found. *McDonald v. United States* (1929), 279 U.S. 12, 20, last par., 73 L. ed. 582, 584, 1 col., 2d par., 49 S. Ct. 218. The effect of a proviso to a statute is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. *Cox v. Hart* (1922), 260 U.S. 427, 435, 67 L. ed. 332(3), 337, r. col., 1st par., 43 S. Ct. 154. See also: *United States v. Morrow* (1925), 266 U.S. 531, 534, last par., 69 L. ed. 425, 427, 1 col., 3rd par. 45 S. Ct. 173; and *Quackenbush v. United States* (1900), 177 U.S. 20, 26, 1 par., 44 L. ed. 654, 656, r. col., last par., 20 S. Ct. 536.

Clause (1) of the first proviso states that no certificate shall be required for the construction, acquisition or operation of "a line within a single State unless such line constitutes part of an interstate line". In other words, clause (1) says that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes part of an interstate line.

Now what is meant by the term "interstate line"? If it means a line engaged in interstate communication, as

some contend, clause (1) would then say that no certificate shall be required for a line involved in interstate or foreign communication within a single state unless such line constitutes a part of interstate communication. Such an interpretation of "interstate line" destroys the efficacy of the proviso's clause (1) because the opening clause of Section 214 would have accomplished precisely that without any help from clause (1) as so misconstrued.

However, if the term "interstate line" means simply what it says – a line crossing a state boundary – clause (1) of the first proviso is then rendered intelligible. It means then that an interstate communication line physically located entirely within a single state is exempt from Commission certification simply because the state commission is fully competent to regulate a line located entirely within its jurisdiction. On the other hand, if the line is a part of a line crossing a state boundary, two or more states are involved and Commission certification is imposed to avoid the possibility of state regulatory conflicts.[10]

Any other definition of "interstate line" would emasculate clause (1).

Furthermore, it is clear that the word "line" as used in Section 214 and as used in its forebearer, Section 1 (18-22) of the Interstate Commerce Act, means the line of a common carrier. The basic purpose of a Section 214 type provision is to prevent the uneconomic duplication of the physical facilities of common carriers.

Section 214 only applies to common carriers and all lines referred to therein must be certificated by the Commission unless exempted therein.

---

[10]Cases such as *Southwestern Bell Telephone Company* (1938), 6 FCC 529, and *Mackay Radio and Telegraph Company* (1938), 6 FCC 562, are distinguishable on the ground that they applied Section 214 certification to lines carrying interstate messages and forming a part of a unified system of toll lines of a common carrier serving more than one state.

The Commission determined, on the basis of CATV systems being engaged in interstate communications, that such communications constitute a "line" which begins at a television broadcast station in one state and ends in another state where the broadcast signals are picked up by the antenna of a CATV operator and distributed to its customers through common carrier provided channel service facilities located entirely within the receiving state. This determination is fallacious because the broadcast link in such interstate communication does not constitute part of an "interstate line" within the meaning of Section 214. This is so for three reasons.

First, the broadcasting of television signals does not create a "line" as that term is commonly understood. Second, the broadcaster is not a common carrier nor is it subject to Section 214. See Sec. 3(h). Third, if the broadcasting of television signals created an "interstate line", then such broadcasting would have to be certificated under Section 214 like any other "line".

A further fallacy in the reasoning of the Commission is illustrated by its tacking the signal of a non-common carrier television broadcaster to the single State lines of a common carrier in order to produce an "interstate line" supposedly within the meaning of Section 214. The illegitimacy of such tacking has been recognized previously by the Commission and by the Supreme Court in several decisions involving analogous situations.

In *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958), in holding that it lacked jurisdiction to regulate CATV systems as common carriers under Title II of the Communications Act, the Commission properly expressed doubts as to its jurisdiction over common carrier lines used to furnish CATV distribution service, saying:

> *. . . Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of*

> *the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation,* nor could the Commission limit the period of time in which such systems could continue in operation. For example, common carriers are not required to obtain any certification or other authorization under Section 214(a) of the Act to construct or operate "local branch, or terminal lines not exceeding ten miles in length."[6] . . .
>
> [6]Even if held to be common carriers, it is also debatable whether most CATV systems would be subject to the provisions of Title II of the Communications Act inasmuch as the physical facilities of most systems are situated within a single State. Notwithstanding that such systems may pick up and distribute television signals and programs originating in other States, there is substantial question whether their operations could be construed to involve interstate common carriage. See Pennsylvania R.R. Co. v. P.U.C. of Ohio, 298 U.S. 170." (24 FCC at 255). (Emphasis supplied.)[11]

The Commission's reference in its above-quoted opinion in the *Frontier Broadcasting Co.* case to the *Pennsylvania R.R.* case constituted recognition of the legal rule that interstate lines of noncommon carriers cannot be combined with common carrier lines within a state in order

---

[11]In holding that it had jurisdiction to regulate some of the operations of CATV companies, although neither as broadcasters nor as common carriers, the Commission in the Second Report and Order, Dockets Nos. 14895 *et al.*, 2 F.C.C. 2d 725, 732 (1966), volunteered the dictum that ". . . a CATV system, if it were a carrier would constitute 'part of an interstate line' for purposes of Section 214(a), even though its facilities were located within a single State." Even if this statement answered a question which was in issue in that proceeding, which it did not, it would not be dispositive of any issue ceeding, which it did not, it would not be dispositive of any issue here before the Commission. The telephone companies are not CATV operators and do not engage in the selection or retrieval off the air of broadcast programs.

to bring the latter within a statutory provision, which, as does Section 214(a) of the Communications Act, regulates only interstate lines of common carriers.

In *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170, 80 L. Ed. 1130 (1936), a coal company, after mining coal in Pennsylvania and transporting it by barges between points in Pennsylvania, transported the coal over its own railroad from Pennsylvania to its plant in Ohio. There the coal was washed, broken, assorted and then shipped by common carrier railroad to other points in Ohio. The Supreme Court ruled that the carriage by the common carrier railroad within Ohio was not subject to regulation by the Interstate Commerce Commission under Part I of the Interstate Commerce Act (from which Part II of the Communications Act was derived).[12]

Speaking for the Court Mr. Justice Cardozo declared:

> "The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper.
>
> "Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit . . . But there is confusion of thought in such a statement of the problem. Not all commerce

---

[12]See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 3 (1934).

is transportation, and not all transportation is by common carriers by rail. *The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission.* The Interstate Commerce Act (49 U.S.C. §1 *et seq.*) is aimed at common carriers exclusively, §1(1), (3), and not even at all these. . . . Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property . . . wholly within one State and not shipped to or from a foreign country from or to any place in the United States.' §1 (2) (a), (b). . . . And 'wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." ' §1 (3).

"With the aid of these definitions the problem before us takes on a new simplicity. . . . The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. *Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process.*

. . .

"Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined

> *with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt.* Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be." (298 U.S. at 173-77). (Emphasis supplied.)[13]

The rationale of the above decision has been followed in cases specifically involving the question whether a certificate was required for the construction of a line. *Pennsylvania R.R. v. Pittsburgh, L. & W. R.R.*, 83 F.2d 861 (6th Cir. 1936), *cert. denied*, 299 U.S. 572; *New York Cent. R.R. v. Southern Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd.*, 338 F.2d 667, *cert. denied*, 380 U.S. 954, *rehearing denied*, 381 U.S. 907. These cases hold that for purposes of Section 1(18) of the Interstate

---

[13]In the recent case of *Pennsylvania R.R. v. United States*, 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd.*, 382 U.S. 368, 372, *rehearing denied*, 382 U.S. 914 (1966), Mr. Justice Cardozo's opinion in *Pennsylvania R.R. v. Ohio P.U.C., supra*, was approved and followed in holding that the Interstate Commerce Commission did not have jurisdiction over intrastate transportation by for-hire motor carriers under Part II of the Interstate Commerce Act, where goods had moved or would move to or from points outside the state by private motor carriers.

Commerce Act, which, like Section 214 (a), deals with certificates for the construction of lines, noncommon carrier lines cannot be combined with common carrier lines to bring a line under certificate requirements.[14]

The above cases under the Interstate Commerce Act are directly in point.[15] These cases support the conclusion that the telephone companies, in providing their CATV channel service, are not using lines which constitute "part of an interstate line." The noncommon carrier broadcast signal, even if it could be considered a "line," could not properly be combined with a common carrier's CATV distribution line located wholly within one state to constitute an "interstate line" under Section 214 (a).

We believe that these considerations plainly demonstrate that common carrier provided CATV channel service facilities, which are located entirely within a single state, are exempt from Commission certification under clause (1) of the first proviso.

---

[14]See also *Public Service Elec. & Gas Co. v. FPC*, 371 F.2d 1 (3d Cir. 1967), in which the court held that no certificate was required for the line of a noncommon carrier which was an extension of an interstate pipeline for which a certificate was required.

[15]Section 1(18) of the Interstate Commerce Act, which requires a certificate of convenience and necessity for the construction or extension of a line of a railroad, is one of the provisions from which Section 214 of the Communications Act was derived. See S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 6 (1934); 78 Cong. Rec. 8824 (May 15, 1934); 78 Cong. Rec. 10314 (June 2, 1934).

Although there are specific differences between the two acts in the coverage of the certificate requirements, these differences are not pertinent to the concept of what is an interstate line of a common carrier under Section 214(a).

B. CATV Channel Service Facilities Not Exceeding Ten Miles in Length

Clause (2) of the first proviso of Section 214 (a) provides that no certificate shall be required for the construction, acquisition or operation of "local, branch, or terminal lines not exceeding ten miles in length." In other words, clause (2) exempts from Commission certification local, branch or terminal lines engaged in interstate or foreign communication, even if actually crossing a state boundary, if they do not exceed ten miles in length.

The Commission, however, although recognizing that "the legislative history sheds little light on the subject," nevertheless concluded that "the exemption is intended to apply to minor additions or improvements to existing facilities or services and the expenditure involved is ordinarily small." Commission's Order, at par. 21, p. 14.

The first difficulty with the Commission's position, however, is that the statute refers to "local, branch, or terminal" lines. It makes no mention of "additions" or "improvements," whether or not facilities were pre-existing, or how much they cost. Ordinarily, interpretations of a statute as far afield from the plain meaning of the statutory language have some basis in the legislative history. Yet the Commission claims that the legislative history "sheds little light" on the meaning of the terms at issue.

The Commission, without citation of any apposite authority, characterizes the facilities as "'main' communication lines" requiring "substantial outlays of funds." *Id.* at par. 22, pp. 14-15. There is no justification for such a holding.

The plain meaning of a local line is one confined to the geographical area involved here. It was such a line that the Congress intended the States to regulate irrespective of its "importance" or "cost." The Commission has

baldly adopted a criterion which Congress did not prescribe or intend. It is difficult to conclude anything else but that the Commission has engaged in the most tortured construction in seeking to destroy the very clear exemption of such lines from its jurisdiction.

If the facilities at issue here, which, in general, are not only located within a single state, but also within a single telephone exchange area, are not "local" in character then the term is simply rendered meaningless. The local telephone exchange area,[16] is an area which Congress has committed to state and local regulation under Section 221 (b) of the Act.

The Senate and House Committees, in reporting S. 3285, a bill proposing the Communications Act of 1934, both stated that Section 221 (b) was inserted to "conform to recommendations of the State commissions and will enable those commissions, when authorized to do so, to regulate exchange services in metropolitan areas overlapping State lines.[17]

The witnesses for the NARUC and the state commissions characterized service within exchange areas as being local and primarily of state concern. For example, NARUC General Solicitor Benton, in testifying before the Senate Committee on Interstate Commerce on March 15, 1934, stated that:

---

[16]"Telephone exchange service" is defined by Section 3(r).

[17]Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, 73d Cong., 2d Sess., p. 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, 73d Cong., 2d Session, p. 7.

> . . . The Federal Government is the only Government that can regulate interstate toll rates. The Federal Government should accordingly have full and effective powers of regulation as to those.
>
> On the other hand, exchange service is local. There is no reason why people having complaints about their exchange service or rates should be compelled to carry their complaints to Washington. Such service is subject to State regulation. Even though it passes over State lines, by reason of its local character, the State where the service is delivered may regulate. This the United States Supreme Court held very clearly in the *Pennsylvania Gas Co.* case. (252 U.S. 23).[18]

And NARUC First Vice President McDonald of Wisconsin, in testifying on March 14th before the same Committee, stated that:

> We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over matters of purely State concern, such as so-called exchange or local rates of telephone companies.[19]

McDonald made the same statement on May 9, 1934, in testimony before the House Committee on Interstate and Foreign Commerce.[20]

NARUC General Solicitor Benton, in testifying before the same House Committee on May 9th, stated that:

> Section 221 (b) recognizes the local character of exchange service, even though to some patrons

---

[18]Hearing Record on S. 2910, p. 180, 5th par.

[19]Id., p. 156, 2d par.

[20]Hearing Record on H.R. 8301, p. 132, 4th par.

> of a particular exchange, the service may be rendered across State lines. Taking advantage of the rule laid down in the *Pennsylvania Gas Co. v. Public Service Commission of New York* (252 U.S. 23), which holds that in the case of such local service, a State may regulate where Congress does not regulate; exchange service is left, by section 221, to the exclusive regulation of the State, where the State has made provision for regulation by a State commission.[21]

Furthermore, the Commission in *Frontier Broadcasting Company Case* (1958), 24 FCC 251, which held that CATV systems are not common carriers under the Act, stated that:

> . . . Although CATV systems, as common carriers, might be subject to the rate-making and other conventional regulatory powers of the Commission, such systems in most instances would not be required to obtain any authorization or certification from the Commission prior to commencement of operation, nor could the Commission limit the period of time in which such systems could continue in operation. For example, common carriers are not required to obtain any certification or other authorization under Secdtion 214 (a) of the Act to construct or operate "local, branch, or terminal lines not exceeding ten miles in length." . . . (Page 255).

These quotations clearly indicate that Congress and the Commission have characterized service within a local exchange as being local in nature. Hence, common carrier provided CATV channel service facilities, located entirely within an exchange area, constitute "local" lines within

---

[21] *Id.*, p. 137, 2d par.

the meaning of clause (2) of the first proviso. If the facilities were categorized as something more than local, it would be difficult to imagine any kind of common carrier offering that would be "local" under clause (2).

Consequently, any common carrier provided CATV channel service facility not exceeding ten miles in length is exempt from Commission certification under clause (2) even if it crosses a state boundary.

C. Commission Inability to Certificate Operator Provided CATV Channel Service Facilities

Another consideration militating against Commission certification of common carrier provided CATV channel service facilities is the inability of the Commission to certificate channel service facilities provided by CATV operators.

The certificate requirements of Section 214 only apply to "carriers", which term is defined by Section 3(h) of the Act as follows:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The Commission has consistently held that CATV systems are not common carriers within the meaning of Section 3 (h) and, hence, do not come within the provisions of Title II applicable to carriers. *Second CATV Report and Order* (1966), 2 FCC 2d 732 (17); *Frontier Broadcasting Company* (1958), 24 FCC 251; *CATV and TV Repeater Services*, 26 FCC 403, 427-428; and *WSTV, Inc. v.*

Fortnightly Corp., 23 Pike & Fischer, R.R. 184. See also *United States v. Southwestern Cable Company*, 392 U.S. 157, 169, ftn. 29, 20 L. Ed. 2d 1001, 1011, ftn. 29 (1968).

Obviously, Congress intended when it enacted Section 214 and its forebearer, Section 1 (18-22) of the Interstate Commerce Act, that only Commission regulated carriers would be constructing the "lines" referred to therein. The purpose of Section 214 was recognized by the Commission in the Order adopted June 25, 1968, p. 11, par. 16, in the following terms:

> Manifestly, Congress intended by Section 214 to confer upon the Commission broad supervisory control over construction by communications common carriers in order to insure that such construction would not be inconsistent with the public interest; *e.g.*, not wasteful or unnecessary. *Mackay Radio and Telegraph Company*, 6 FCC 562 (1938). As the Supreme Court stated in construing and applying comparable language in the Interstate Commerce Act[17] ". . . the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public. . . . "

[17] *Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company*, 270 U.S. 266, 277 (1926).

However, the Commission simply cannot carry out the Congressional intent within the context of the subject matter of this case. To hold Section 214 certification requirements applicable to common carrier provided CATV channel service facilities, would mean that the Commission could only exercise jurisdiction over a fraction of the subject matter. Any common carrier line certificated by the Commission could later be paralleled by a CATV system operator, thereby rendering certification pointless and causing a consequent "waste of resources."

The regulatory purpose reflected by Section 214 logically presupposes that the regulatory body shall have jurisdiction over the construction of *all* lines. Otherwise, it cannot prevent the uneconomic duplication of facilities.

The regulatory concept of 214 cannot be rationally applied to facilities which may be furnished by either carriers or non-carriers.

III

THE CERTIFICATION REQUIREMENTS OF SECTION 214 OF THE COMMUNICATIONS ACT ARE NOT APPLICABLE TO COMMON CARRIER CATV CHANNEL SERVICE FACILITIES, LOCATED ENTIRELY WITHIN AN EXCHANGE AREA, BECAUSE THEY COMPRISE A PART OF "TELEPHONE EXCHANGE SERVICE" EXEMPTED FROM COMMISSION REGULATION BY SECTION 221(b) WHEN REGULATED BY STATE OR LOCAL GOVERNMENT.

Section 221 (b) of the Communications Act, as amended, provides that:

> Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Section 3(r) of the Act, relative to definitions, provides that:

> "Telephone exchange service" means service within a telephone exchange, or within a connecting system of telephone exchanges within the

> same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge.

Section 221 (b) was placed in the Act pursuant to the recommendations of the state commissions so as to preserve state jurisdiction over exchange services and facilities.[22]

Consequently, where common carrier CATV channel service facilities are located entirely within a telephone exchange service area and are subject to state or local regulation, they are exempt from certification under Section 214. Under these circumstances, the facilities provide nothing more than an intra-exchange wire communication service.

The common carrier offering of CATV channel service is merely one of the later developments in the ever-changing variety of local communication services offered in an exchange area. The exemption from federal regulation of telephone exchange facilities implicitly carries with it the like exemption of ancillary local facilities within the exchange area. It would be unreasonable to suppose, on one hand, that Congress intended to exempt the conventional telephone facilities providing the basic means of communication within an exchange area and, on the other hand, intended Commission regulation of lesser communication facilities within an exchange area.

The Commission in asserting jurisdiction over the programming aspects of the CATV industry has referred to

---

[22]Report No. 781 of Senate Committee on Interstate Commerce, dated April 17, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934, 73d Cong., 2d Sess., page 5; Report No. 1850 of House Committee on Interstate and Foreign Commerce, dated June 1, 1934, to accompany S. 3285, 73d Cong., 2d Sess., page 7.

National Broadcasting Company v. United States (1943) 319 U.S. 190, 219, last par., 87 L. ed. 1344, 1364, r. col., 1st par., in which the Court stated that Congress in enacting the Communications Act avoided an over-itemization which "would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."[23]

We believe this same kind of philosophy applies in interpreting the exemption of facilities involved in exchange service. Obviously, the Section 221 (b) exemption is not "stereotyped" to the same kind of exchange facilities which were prevalent in 1934, but is sufficiently flexible to include CATV channel service facilities which are primarily of local concern and hence within the congressional intention to exempt.

In view of these considerations, we believe that common carrier provided CATV channel service facilities, which begin and end within a telephone exchange area, logically fall within the purview of 221 (b) and hence are exempt from the application of Section 214 when state or locally regulated.

IV

SECTION 214 OF THE COMMUNICATIONS ACT IS NOT APPLICABLE TO CATV CHANNEL SERVICE FACILITIES FURNISHED BY CONNECTING CARRIERS.

Section 2(b) of the Communications Act provides that:

> Subject to the provisions of Section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction

---

[23]Second CATV Report and Order (1966) 2 FCC 2d 795.

> with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any *carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier,* or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; *except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).* (Emphasis supplied.)

Section 3 (u) of the Act, relative to definitions, states that:

> "Connecting carrier" means a carrier described in clause (2), (3), or (4) of section 2 (b).

In determining that the telephone companies heretofore classified as "connecting carriers" were subject to the certification requirements of Section 214, the Commission erroneously misconstrued the use of the word "solely" in Section 2 (b) (2) by stating that:

> The connecting carrier which furnishes channel service to a CATV system is engaged in inter-

> state communication because, just as in the case of the fully subject carrier, it acts as a link in the interstate transmission of television signals from the broadcaster to the viewer (*supra*, par. 18), and not "solely" by reason of any interconnection with another common carrier. Order, par. 26, pp. 16-17.

The Congressional intent relative to Section 2 (b) (2) is reflected by the following excerpts from Report No. 1850 submitted by the House Committee on Interstate and Foreign Commerce on June 1, 1934, to accompany S. 3285, a bill proposing the Communications Act of 1934:

> While the Senate bill and the amendment here reported are alike in most respects, there are three principal differences which may be noted as follows:
>
> . . .
>
> (2) The Senate bill includes an amendment adopted on the floor of the Senate exempting carriers engaged in interstate or foreign commerce solely through physical connection with the facilities of a nonaffiliated carrier. The amendment retains this provision except that it makes such carriers subject to section 201 and 205, providing for regulation of charges and prohibiting discriminations. Such carriers will not, however, be required to file schedules of charges. . . .[24]
>
> Section 2 makes the bill applicable to all interstate and foreign communication by wire or radio, except that independent telephone companies engaged in interstate or foreign communication only through physical connections with another nonaffiliated carrier are subjected only to certain sections of the act designed to insure reasonableness of rates and no discrimi-

---

[24] Report, page 2.

> nation in service. The bill also exempts the intrastate business of any carrier.[25]

The Act was approved on June 19, 1934, and on August 14, 1936, the Commission decided the *Capital City Telephone Company Case*, 3 FCC 189, which provided an administrative construction of Section 2 (b) (2) virtually contemporaneous with the passage of the Act.

In *Capital City*, the Commission, relying on Section 202 (b) authorizing it to regulate service for use "in chain broadcasting or incidental to radio communication of any kind," held that it had exclusive regulatory jurisdiction over the wire service furnished by the Capital City Telephone Company of Jefferson City, Missouri, to a radio station for interstate broadcasting purposes, even though the wires did not cross a state boundary.[26] *But* the Commission held that the furnishing of such service did not change the status of Capital City as a connecting carrier.

Connecting carriers were then and are now subject to regulation under Section 202 (b) by express exception to the broad exemption contained in Section 2 (b).

Section 202 (b) at the time of *Capital City* provided that "Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind." . . . Section 202 (b), as amended in 1960,[27] now reads as follows:

> Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of com-

---

[25] Report, page 4.

[26] The wires were used to carry programs from the station's broadcast studio to its radio transmitter.

[27] Public Law 86-751, approved September 13, 1960, 74 Stat. 888.

> munication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

The *Capital City* doctrine was approved and applied in *Ward v. Northern Ohio Telephone Company* (CA-6th-1962) 300 F2d 816, cert. den., 371 U.S. 820, 9 L. ed. 2d 61, 83 S. Ct. 37.

The Commission in its Order adopted June 25, 1968, p. 17, par. 27, has now decided that it was wrong when it decided the "connecting carrier" aspect of *Capital City* in 1936, and that it has been consistently wrong in relying on *Capital City* as a precedent for over thirty years.

The Commission recognizes that the *Capital City* doctrine relative to connecting carriers is a complete bar to its effort to expand its jurisdiction in this proceeding, and therefore seeks to overrule the doctrine.

The Commission's reversal of itself is predicated on what we believe to be a misconstruction of the word "solely"as it appears in Section 2 (b) (2). Based upon Section 2 (b) (2) providing that a connecting carrier is one "engaged in interstate or foreign communication *solely* through physical connection with the facilities" of another nonaffiliated carrier (emphasis supplied), it has determined that when such a carrier furnishes wire service to a radio station or CATV system under Section 202 (b), which concerns interstate or foreign communication, the carrier is immediately stripped of its connecting carrier status because it is then "plurally" involved, instead of "solely" involved, in interstate or foreign communication.

This construction places the word "solely" in the wrong context. The word "solely" was obviously placed in Section 2 (b) (2) to prevent the exemption's application to a carrier engaged in interstate commerce both by furnishing its own facilities across a state boundary and by interconnection with the facilities of another non-affiliated carrier.

As indicated by the excerpts from the congressional report, *supra*, the purpose of Section 2 (b) (2) was to largely exempt from Commission regulation independent telephone companies whose facilities were located entirely within a single state.

The *Capital City* situation, where the independent company furnished wires to carry programs from a station's broadcast studio to its radio transmitter, in proximity to each other and within the same state, undoubtedly epitomized an operating situation which was prevalent throughout the Nation in 1934.

Congress, by inserting the exception in Section 2 (b) to subject connecting carriers to Commission regulation charges and services in connection with chain broadcasting or incidental to radio communication, was merely carrying out its over-all design for comprehensive Commission regulation of radio broadcasting. It did not intend by Section 202 (b), which was made expressly applicable to connecting carriers, to deprive independent telephone companies of their connecting carrier status for furnishing such a minor common carrier service.

Such a misconception of congressional intent would mean that if a very small independent telephone company in the middle of a very large state should furnish to a radio station or CATV system wire service within 202 (b), no matter how short the wire (one inch or less would do), then the Company would become subject to the Act in the same fashion as a multi-state Bell operating company. On the other hand, the largest independent telephone company in the Nation classified as a connecting carrier would retain this status if it did not furnish such service to a radio station or CATV system. Such a result was unreasonable in 1934, and it is unreasonable today.

This anomalous state of affairs can easily be avoided now, as it has in the past, by the Court construing the word "solely" in the correct context as the Commission did in the *Capital City* case.

V

THE CATV CHANNEL SERVICE PROVIDED BY THE TELEPHONE COMPANIES IS NOT SUBJECT TO THE COMMISSION'S JURISDICTION UNDER SECTIONS 202(b) AND 203(a) OF THE COMMUNICATIONS ACT.

Earlier in this brief the NARUC has shown that the telephone companies are not required to obtain certificates under Section 214(a) of the Act for the lines used by them to furnish CATV channel service because: (1) such lines are wholly within a single state and are not "part of an interstate line"; (2) such lines are local, branch, or terminal lines not exceeding ten miles in length; and (3) the service and the facilities involved constitute exchange service and facilities within the meaning of Section 221(b) of the Act. The NARUC further contends that the Commission's assertion of jurisdiction over telephone company provided CATV channel service under Section 202(b) and 203(a) of the Communications Act is not a basis for application of the certificate requirement of Section 214(a) to the lines being used in furnishing the service, because the Commission was not correct in such assumption of jurisdiction.

The certificate requirements in question apply to *lines*, not to *service*, and thus, even if the Commission were correct in assuming jurisdiction over the *service*, it would not follow that a Section 214 certificate is required for the lines involved. Section 202(b) applies to *service* and *charges* and not to *facilities* used to provide those services. *Services* and *facilities* are not synonyms, contrary to the views of the Commission.

The Communications Act makes significant differentiations between these terms. In Section 2(b)(1), both *facilities* and *services* are exempted when a part of intrastate communication; Section 201(b) refers to *charges* and

services, but not to *facilities;* Section 214(d) refers separately to *services* and facilities; and, most significantly, Section 202(a) specifically includes *services* and *facilities* in the same clause, yet Section 202(b) excludes *facilities* from its coverage.

The exclusion of "facilities" from 202(b) was not a legislative oversight because Sections 202 and 214 are unrelated. *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, 259 (1966). Nor is it necessary to equate Section 214 "lines" or "facilities" with Section 202(b) "services" to protect the federal interest. See *Frontier Broadcasting Co.*, 24 F.C.C. 251, 255 (1958). The regulatory purpose for each Section is distinct from the other. Section 202(b) seeks the nondiscriminatory provision of interstate communications to all, whereas Section 214 seeks to prevent the construction of lines not required by the public convenience and necessity. The NARUC therefore submits that the effort of the Commission to expand its jurisdiction in this case cannot be predicated upon Section 202(b).

But in any event, it would be fallacious to argue that a Section 214 certificate is required because of the Commission's assumption of jurisdiction over the service, since that assumption of jurisdiction was in error.

The Commission first assumed jurisdiction over CATV channel service provided by telephone companies when it wrote AT&T and General on April 6, 1966, directing that, pursuant to Sections 202(b) and 203(a) of the Communications Act, tariffs be filed with it "covering the furnishing of local distribution facilities for use by CATV systems. . . ." The Commission stated that "The furnishing of such facilities by a common carrier is 'incidental to radio communication'" – a characterization quoted from Section 202(b).

In mid-May 1966, the NARUC, speaking through Chairman Ben T. Wiggins of its Committee on Communication Problems, sent a letter to FCC Chairman Hyde referring to the April 6th directive and stating in part that:

> The Committee believes that such a directive to the operating companies is an unwarranted intrusion into an area which is subject to adequate regulation by the state commissions.
>
> I am advised that the operating companies had previously developed a policy of filing these tariff offerings with the state commissions.
>
> We believe that the regulation of rates involving CATV systems is primarily a local concern, and, therefore, best handled by state regulation.
>
> Furthermore, we were under the impression that the FCC agreed with this position from our study of the "Explanation of Proposed Amendments to the Communications Act of 1934, as Amended, Concerning Regulation of Community Antenna Systems," which was issued by it on March 3, 1966, in support of H.R. 13286. We gained a like impression from our study of Chairman Henry's testimony before the House Interstate and Foreign Commerce Committee during its hearings on the CATV bills.
>
> We do not understand this change in position.
>
> In view of these considerations, the NARUC vigorously protests this tariff filing directive and respectfully requests that the FCC review its position in this matter and take such action as will leave this aspect of CATV regulation

> to the exclusive jurisdiction of the state commissions." (NARUC Bulletin No. 30-1966, May 20, 1966, pp. 5-6).

AT&T and General also asked reconsideration of the April 6th directive. In an order adopted June 22, 1966, 4 F.C.C. 2d 257, the Commission, with Commissioner Bartley dissenting, denied the petitions for reconsideration. This decision reaffirmed the Commission's earlier conclusion of jurisdiction upon the basis of Section 202(b).

In the Order adopted on June 25, 1968 here under review, the Commission held:

> By Section 202(b), in the context of the Act, the Commission has been given regulatory jurisdiction over "services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, . . . incidental to radio communication of any kind." Par. 15, page 11.

The Commission's reliance on Section 202(b) is misplaced because it does not confer jurisdiction. The complete Section 202(b) provides:

> Charges or services, whenever referred to in this Act, include charges for, or services in conjunction with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

First, it must be recognized that Section 202(b) does not by its own terms confer any jurisdiction. It is merely definitional in character. It provides that the terms "charges or services," when used elsewhere in the Act, include

charges or services in connection with the use of common carrier lines for certain purposes. It is necessary to look at other provisions of the Act to determine the extent of the Commission's regulatory jurisdiction.

The jurisdiction granted the Commission in other Sections of the Act (*e.g.*, Sections 201(a) and 203(a)) is limited to jurisdiction over "interstate or foreign" communication. In fact Section 2(b) contains the following express limitation on the Commission's jurisdiction:

> (b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

A definition should not be so interpreted as to confer jurisdiction which has been expressly withheld by those statutory provisions which deal with the scope and limitations of jurisdiction.

In general, the service here involved is provided over lines which are wholly within a single state. In general, such lines are being used exclusively to provide a common carrier communications service between points within a single state. Such common carrier service must be considered to be intrastate service unless some provision of law changes its character. But, no such legislative authority is contained in Section 202(b) or in any other Section of the Act.

But even if Section 202(b) could be read as enlarging the Commission's regulatory authority, its effect is limited to charges for, or services in connection with, the use of common carrier lines "in chain broadcasting or incidental

to radio communication of any kind." The CATV channel distribution service furnished by the telephone companies is neither of these.

"Broadcasting" is defined in the Act as "the dissemination of *radio communications* intended to be received by the public, directly or by the intermediary of relay stations." Section 3(o) (Emphasis supplied.) "Chain broadcasting" is defined as the "simultaneous broadcasting of an identical program by two or more connected stations." Section 3(p).

"Radio communication" necessarily involves "transmission by radio," and services "incidental to radio communication" are services "*incidental to such transmission*." Section 3(b) (Emphasis supplied.)

The Commission has found on many occasions that CATV operators are not engaged in broadcasting. *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959); Report and Order *In the Matter of CATV: Amendment of Parts 21, 74, and 91 of the Commission's Rules*, 2 F.C.C. 2d 725, 732 (1966); see also, *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 40-42 (C.D. Cal. 1967), and cases cited. See also, *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U. S. 390, 20 L. Ed. 2d 1176, 1183(7),(1968).

Section 202(b) was never intended to grant the Commission jurisdiction over a common carrier service to one not a broadcaster.

Common carrier cable channel service provided to a CATV operator who has received radio transmission, is not service "incidental to such transmission" within the meaning of the statute. "Radio communication" has ended when the TV or other radio signal is received by the CATV operator. The CATV operator, in providing his CATV service to his patrons, is not engaged in "transmission by radio."

The evidence of record clearly shows that the local distribution of programs by the CATV operator involves a new transmission and a transmission by cable. There is no through communication path carrying broadcast intelligence to the homes of the patrons of the CATV system.

Channel service to a CATV operator is not service used "in chain broadcasting or incidental to radio communication of any kind," within the language of Section 202(b) of the Communications Act.

When the Communications Act was enacted in 1934, Congress was concerned about the common carrier wire services which were necessary to permit radio broadcasters to engage in chain broadcasting. Broadcasters engaged in chain broadcasting were dependent upon the communications common carriers for the lines necessary to carry programs from the point of origination to each station in the network for simultaneous broadcast over the air. It was these common carrier services for use in broadcasting with which Congress was concerned when it declared in Section 202(b) that "Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines . . . in chain broadcasting or incidental to radio communication of any kind." See 78 Cong. Rec., p. 8823 (May 14, 1934), p. 10313 (June 2, 1934). As to the 1960 Amendment to Section 202(b), see 105 Cong. Rec., p. 6256 (April 20, 1959), and the Senate and House Reports recommending enactment of the Amendment.

The legislative history of Section 202(b), and Commission statements in support of its 1960 Amendment to include radio as well as wire circuits, establish that the Section was intended to apply only to charges and services furnished for use in broadcasting and other radio operations. The

Commission has repeatedly held that CATV operators are not engaged in broadcasting. Nor are CATV operators, in utilizing the cable channel service provided by the telephone companies, engaged in any other type of radio transmission. Certainly, the channel service being furnished by the telephone companies to CATV operators is not being furnished for the purpose of enabling the CATV operators to engage in broadcasting or other radio communication.

Thus, since the CATV channel services being furnished by the telephone companies are not "services in connection with . . . the use of common carrier lines of communication . . . in chain broadcasting or incidental to radio communication of any kind," within the meaning of Section 202(b), neither the charges for the service nor the services are subject to the Commission's jurisdiction under Section 202(b) of the Act.

CONCLUSION

The Supreme Court in *Davies Warehouse Company v. Bowles*[28] reaffirmed one of the basic tenets of our federal system of government when it said:

> Local institutions, customs, and policies will not be overridden without fighting for consideration The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not

[28] 321 U. S. 144, 154, 88 L. ed. 635, 642, r col. 2d par. (1944).

> seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'"

We believe that these words are particularly pertinent in this proceeding.

The same kind of careful examination of the Communications Act is required here as was applied by this Court to the Federal Power Act in *Duke Power Company v. Federal Power Commission*, No. 20,578, ____ U. S. App. D. C. ____, ____ F.2d. ____, 37 U. S. Law Week 2025 (June 28, 1968).

In consideration of the foregoing authorities, the NARUC respectfully prays that the Court adjudge and decree that the said Order adopted by the Federal Communications Commission on June 25, 1968, is null and void as being beyond the authority of the Commission; and that the Court issue an order setting aside, annulling and suspending the said Order of the Commission and enjoining its enforcement.

Respectfully submitted,

PAUL RODGERS *as*
General Counsel for the
National Association of
Regulatory Utility Commissioners

October 16, 1968

3327 ICC Building
Post Office Box 684
Washington, D. C. 20044

ADDENDUM

THE COMMUNICATIONS ACT OF 1934, AS AMENDED, 47 U.S.C. 151, *et seq.*

Sec. 1, 47 U.S.C. 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Sec. 2, 47 U.S.C. 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire

or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations or land vehicles in Canada or Mexico; except that sections 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

Sec. 3, 47 U.S.C. 153. Definitions

(b) "Radio Communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sound of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any

State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign contry, but shall not, with respect to the provisions of subchapter II of this chapter, include wire or radio communication between points in the same State, Territory, or possession of the United States or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or fereign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter, but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

(u) "Connecting carrier" means a carrier described in clauses (2), (3), or (4) of section 152(b) of this title.

Sec. 201, 47 U.S.C. 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upom reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: . . .

Sec. 202, 47 U.S.C. 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

Sec. 203, 47 U.S.C. 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violation.

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. . . .

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

Sec. 204, 47 U.S.C. 204. Hearings on new charges; suspension pending hearing; refunds

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and

pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . .

Sec. 205. 47 U.S.C. 205. Commission authorized to to prescribe just and reasonable charges; penalities for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Sec. 213, 47 U.S.C. 213. Valuation of property of carrier

(h) Nothing in this section shall impair or diminish the powers of any State commission.

Sec. 214, 47 U.S.C. 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service.

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local,branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, or reduction, or impairment of service, or partial discontinuance, or

reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a cerrificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Sec. 220, 47 U.S.C. 220. Accounts, records, and memoranda; depreciation charges; forfeitures and penalties.

(h) The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define

further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

Sec. 221, 47 U.S.C. 221. **Telephone companies; consolidation; State jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation.**

(a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford such parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed

as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

Sec. 222, 47 U.S.C. 222. Consolidations and mergers of telegraph carriers

(a) Definitions

As used in this section –

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

No. 22,143

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
TELEPROMPTER CORPORATION,
TELEPROMPTER MANHATTAN CATV CORPORATION,
STERLING INFORMATION SERVICES, LTD.,
STORER BROADCASTING COMPANY,
Intervenors.

Petition To Review an Order of the Federal Communications Commission

---

REPLY BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Marion J. Poulson
CLERK

PAUL RODGERS *as*
General Counsel for the
National Association of
Regulatory Utility Commissioners

3327 ICC Building
Post Office Box 684
Washington, D.C. 20044
628-7326
Area Code 202

January 17, 1969

THE CASILLAS PRESS, INC. — 1717 K Street N. W. — Washington, D. C. — 223-1220

INDEX

AUTHORITIES CITED

Cases:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,143

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
TELEPROMPTER CORPORATION,
TELEPROMPTER MANHATTAN CATV CORPORATION,
STERLING INFORMATION SERVICES, LTD.,
STORER BROADCASTING COMPANY,
Intervenors.

Petition To Review an Order of the
Federal Communications Commission

REPLY BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PRELIMINARY STATEMENT

The contents of the briefs of the Federal Communications Commission and of the Intervenors filed on December 13, 1968, in this case and those consolidated with it (Nos. 22,106, 22,112, 22,113, and 22,116) were largely anticipated by the initial brief of the National Association of Regulatory Utility Commissioners (NARUC) and, hence, no extensive reply is warranted.

Basically, the briefs of the Commission and of the Intervenors seek to obscure two fundamental aspects of

this litigation in order to satisfy the Commission's increasing appetite for power and to avoid troubling itself by seeking an additional grant of authority from the Congress.

First, the Commission apparently construes *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L. Ed. 2d 1001 (1968), as affording "blank check" authority to engage in whatever regulation it desires with respect to community antenna television (CATV) systems. Actually, the Supreme Court in *Southwestern Cable* merely upheld the Commission's adoption of regulations governing the carriage and nonduplication of television programs by CATV systems in order to avoid the serious competitive impact of CATV service upon local broadcasting stations and the threatened economic elimination of the latter as a result of CATV duplication of the very programs upon which the local station relies for its sponsor-advertising revenues.

Therefore, the Court's holding in *Southwestern Cable* was specifically limited to the approval under Title III of Commission jurisdiction "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The Court expressed "no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 178, 2d par., 20 L. Ed. 2d 1016 (15).

Accordingly, *Southwestern Cable* is not controlling in this case and does not in any way support the Commission's efforts to extend its jurisdiction under Title II over the construction of CATV channel service facilities by common carriers.

Second, the Commission seeks to inject extra-judicial reasons as to why it believes its new jurisdictional conquest should be upheld and seeks to avoid, as best it can, the plain meaning of the statutory language and the

congressional intent behind it. The best example of this is contained on pages 11 and 12 of the Commission's brief which summarizes the accusations contained in complaints by CATV system parties which were never resolved by the Commission. In fact, the Commission admits that the complaints were dismissed.

This effort to jeopardize statutory construction is also reflected by the brief of the Intervenor, City of New York, which largely dwells on its displeasure with the laws of New York governing the franchising and regulation of CATV systems within the municipal limits. The City simply seeks an extension of Commission authority to supersede laws enacted by representatives of the people of New York which it deems undesirable.

We submit that these problems are appropriate for legislative consideration and are irrelevant to the legal aspects of this case.

While we do not wish to burden the Court with a reiteration of the arguments contained in our initial brief, we believe a further reply would be of assistance to the Court in construing the "local" lines exemption contained in Section 214(a)(2) of the Communications Act of 1934, as amended (47 U.S.C., Secs. 151 *et seq.*).

ARGUMENT

COMMON CARRIER PROVIDED CATV CHANNEL SERVICE FACILITIES, NOT EXCEEDING TEN MILES IN LENGTH, ARE "LOCAL, BRANCH, OR TERMINAL LINES" WITHIN THE MEANING OF SECTION 214(a)(2) AND, HENCE, EXEMPT FROM COMMISSION CERTIFICATION.

The Commission in its brief (pp. 36-39) has intensified its efforts to obfuscate the plain meaning of Section 214(a)(2), which provides that no certificate shall be required for the construction, acquisition or operation of "local, branch, or terminal lines not exceeding ten miles in length."

The Commission, since the vast majority of the CATV channel service lines in question do not exceed ten miles in length, has been forced to "invent" other criteria to defeat the exemption. Accordingly, the Commission contends that the exemption is inapplicable for three reasons:

1. Because the CATV lines are "main" lines and not "local" lines;

2. Because the CATV lines are expensive; and

3. Because the CATV lines provide a new service.

The precise meaning of the words "main" and "local" of course depends upon the context in which they are used. The provisions of Section 214, including the exemptions therein, apply solely to lines engaged in interstate or foreign commerce because Section 2(b)(1) of the Act excludes Commission jurisdiction under Title II with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

Therefore, the "local" lines exempted from certification by Section 214(a)(2) are clearly lines engaged in interstate or foreign commerce.

We believe that the CATV lines in issue here are plainly "local" because in general they are not only located within a single State, but are also within a single telephone exchange area – an area which Congress has committed to State and local regulation under Section 221(b) of the Act even in instances when exchange services in metropolitan areas overlap State lines.

For example, the very large Washington metropolitan exchange area encompasses the District of Columbia and parts of Maryland and Virginia and calls therein are subject exclusively to State and local regulation. The dimensions of the exchange area are measured by the distance you can call without incurring a toll charge.

Obviously, service rendered within this exchange area or in any other is "local" within the meaning of the Communications Act.

The relationship between the national volumes of "local" and "toll" calls is revealed by a publication entitled "Statistics of Communications Common Carriers" issued by the Commission for the year ended December 31, 1966, pages 16-17, of which the Court may take judicial notice. This publication -- the latest issue of its kind -- reveals that during 1966 there were 134,058,911,000 "local" calls and 6,646,954,000 "toll" calls. Since all of the local calls, and that portion of the toll calls which were intrastate, are subject to State and local regulation, it is obvious that the telephone business in the Nation is predominantly "local" within the meaning of the Communications Act.

Furthermore, in fully considering the relationship between the words "main" and "local" we must evaluate the relative importance of CATV service and telephone exchange service to the average subscriber.

A subscriber in the Washington metropolitan exchange area, upon acquiring CATV service for his television set, would receive a clearer picture of the TV programs he now receives and would also receive programs from distant television stations if permitted by the Commission. Supposedly, the entertainment he receives from his TV set would be enhanced.

On the other hand, the communications service which the telephone subscriber receives in the Washington metropolitan exchange area is virtually indispensable in today's society. Not only can he talk with his friends and business associates, but he can call a doctor if he or a member of his family requires emergency medical attention. He can call the police if he is threatened with bodily harm or otherwise requires protection. He can call the fire department to report a fire.

If a subscriber in the Washington metropolitan exchange area or in any other had to choose between the Commission's so-called "main" line CATV service or his "local" telephone service, which would he choose? Which is the most important to his personal and business life?

CATV service is not a "main" line service as the Commission would have us believe, but rather a service of far less importance to the public than local telephone exchange service.

The Commission says it should have jurisdiction over CATV lines because they carry interstate signals. This is irrelevant under the language of the exemption. In contrast, the local telephone exchange service is an integral part of the national and international toll network and yet it is reserved exclusively for State and local regulation. It is the gateway to the toll network and without it the toll network would be worthless.

The latest recognition of the local character of CATV service is reflected by the decision of a Three Judge Federal District Court in Nevada issued on December 2, 1968, in *TV Pix, Inc. v. Taylor, et al.*, ___ F. Supp. ___, Civil Action No. 1814. In this decision, the Court upheld a State statute empowering the Nevada Public Service Commission to regulate CATV companies as public utilities. The statute was unsuccessfully challenged on the grounds: that it imposed an unconstitutional burden on interstate commerce; that Congress had preempted the field of television communications; and that the statute deprived the plaintiff of its property without due process of law.

In upholding State regulation the Court stated that:

> . . . the apparatus of the community antenna system is an appendage to the primary interstate broadcasting facilities with incidents much more local than national,

> involving cable equipment through the public streets and ways, local franchises, local intrastate advertising and selling of services and local intrastate collections. In this perspective, a community antenna system is essentially a local business and, in its impact on interstate commerce, is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee. . .

As to its *Second* contention, the Commission in its brief, p. 36, says that CATV lines are not "local" lines because they require "substantial outlays of funds." As noted above, the plain language of Section 214(a)(2) makes no reference to cost.

Nevertheless, it is helpful, in analyzing the validity of the Commission's contention, to also place the element of cost in its proper perspective.

The Commission states in its Brief, p. 8, that "the record shows the investment cost of the then extant Bell channel service facilities to be $43,240,019.00." This is apparently an indication of the "substantial outlay of funds" the Commission has in mind.

The Statistics of Communications Common Carriers referred to above reports at page 33 that the total net communications plant of the Bell System is $30,765,568,524.00. The Commission in an Interim Decision and Order issued on July 5, 1967, in *Re American Telephone and Telegraph Company et al.* 70 PUR 3d 129, at page 145, par. 21, stated that "In terms of plant investment and revenues, the interstate and foreign service of the Bell System respondents account for about 25 per cent of their total operations." In paragraph 22, page 146, of the same case, the Commission states that

the net plant investment of Bell devoted to interstate and foreign services is $8,606,209,000.00.

Comparing these figures together, we see that approximately 22 billion dollars of the Bell plant is subject to State and local regulation and approximately 8½ billion dollars is subject to Commission regulation.

For the Commission to seek to hang its jurisdiction in this case on an insignificant 43 million dollar investment by Bell in CATV lines is ludicrous to say the least in view of the total Bell investment and the division of regulatory responsibility.

The *third* contention of the Commission is that CATV service is "significantly different from that theretofore provided" (Brief, p. 36) and that, consequently, this new service does not fall within the 214(a)(2) exemption regarding "local" lines. The plain meaning of the language of the 214 (a)(2) exemption makes no reference to the kind of service afforded by the "local" lines.

Furthermore, the Commission's newly invested "new service" theory for Section 214 certification was not applied when common carriers long ago provided similar new services to television and radio broadcasters, nor was it applied in the transmission of data.

CONCLUSION

We agree with the Commission's view that the CATV field is a rapidly developing one with attendant problems. However, we believe that it is decidedly in the public interest for the Congress to formulate governing policy, and that the Commission should not be permitted to here twist the plain meaning of Title II of the Act and to go deeper and deeper into Congressionally uncharted waters.

Respectfully submitted,

PAUL RODGERS as
General Counsel for the
National Association of
Regulatory Utilitiy Commissioners

3327 ICC Building
Post Office Box 684
Washington, D.C. 20044

628-7326
Area Code 202

January 17, 1969